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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 397 MISC.

THE PEOPLE and etc. *ex rel.* EVERETT RHEIM,
Appellant.

against

JOHN A. LYONS, Commissioner of Correction of the State of New York,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES CITED:

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New York State Correction Law § 187 5

New York State Correction Law § 189 5

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the respondent in the above entitled cause, by the Attorney General of the State of New York, and opposes the petition herein and asks that it be denied.

Statement of the Case

The petitioner prays for a writ of certiorari to review an order of the Supreme Court of the State of New York, dated December 31, 1948, dismissing his application for an order of mandamus, directing the respondent, John A. Lyons, Commissioner of Correction of the State of New

York, to place petitioner's reserve compensation in a Federal Reserve Bank at Auburn, New York, subject to his disposal.

Petitioner appealed from this order to the Appellate Division of the Supreme Court, Third Judicial Department. That Court, on November 29, 1949, unanimously affirmed the lower court. Thereafter and without notice to the respondent, the petitioner moved the New York State Court of Appeals for permission to appeal to that court. His motion was denied on January 5, 1950.

Facts

On November 9, 1928, petitioner was convicted of murder in the second degree, and was sentenced by the Hon. Otto A. Rosalsky, Judge of the Court of General Sessions, County of New York, to a term of 45 years to life. On May 26, 1947, he addressed a letter to John A. Lyons, Commissioner of Correction, requesting the Commissioner to direct the Warden of Auburn Prison, wherein he was then incarcerated, to place $110.00 of his reserve compensation in a fund to be used for copies of all "trial matters and other exhibits of procedure" to be used in an appeal which he allegedly was prosecuting in the appellate courts of New York State. As a matter of fact, petitioner had never appealed from his judgment of conviction and no appeal was pending in 1947.

On May 29, 1947, William E. Leonard, Deputy Commissioner of the New York State Department of Correction, wrote Rheim, acknowledging receipt of his request and advising him that it was contrary to the policy of the department to permit inmates to expend reserve compensation funds for the purpose designated by petitioner and that his request was therefore denied.

In denying the application for an order of mandamus, Mr. Justice Elsworth said that the duty of the Commissioner of Correction with respect to earnings of prisoners is solely an administrative function (Mr. Justice Elsworth's memorandum decision, which has not been made a part of petitioner's application, is attached to this brief and marked Exhibit A). The Appellate Division, Third Judicial Department, unanimously affirmed the order entered upon this decision (276 App. Div. 811).

POINT I

Petitioner did not exhaust his remedies in the state courts and there has been no decision on the merits by the highest court of the state in which a decision could be had.

The Constitution of the State of New York (Art. VI, § 7), defining the jurisdiction of the Court of Appeals, provides:

> "Appeals may be taken to the Court of Appeals in the classes of cases enumerated in this section. * * *.
>
> In civil cases and proceedings as follows:
>
> (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification."

If the petitioner is correct in his contention that the case presents a question under the Constitution of the United States, he was entitled to appeal to the Court of Appeals as of right. He did not avail himself of that right and there has been no decision by the Court of Appeals upon that constitutional question.

Section 589 of the Civil Practice Act of New York authorizes appeals to the Court of Appeals by permission of the Appellate Division or by permission of the Court of Appeals, but only from an order or judgment which is not appealable as a matter of right.

An identical question concerning the jurisdiction of this Court was presented in *Morris Plan Industrial Bank of New York* v. *Graves, et al.* (1941), 314 U. S. 572. This Court's decision was as follows:

> "*Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment of the highest court of the State on the constitutional question presented. The Chief Justice took no part in this decision."

In that case, the appellant, in addition to moving the Appellate Division and the Court of Appeals for leave to appeal, which motions were denied, had served notice of appeal to the Court of Appeals as of right from the final order of the Appellate Division. After the dismissal of the appeal to this Court, the appeal as of right to the Court of Appeals was brought on for argument and resulted in a decision affirming the order appealed from (288 N. Y., Mem. p. 91). Upon appeal to this Court, the appeal was dismissed for the want of a substantial Federal question (317 U. S. 591).

In the instant case there has been no final adjudication of the merits by the highest court of the State of New York and petitioner has not exhausted his remedies in the state courts.

POINT II

The determination of the Commissioner of Correction is a matter of discretion which the courts will not review.

The Legislature of the State of New York has given the Commissioner of Correction the utmost discretion in disposing of moneys paid to a prisoner for his labor.

Section 112 of the Correction Law declares that the Commissioner shall have the superintendency, management and control of state prisons and of the prisoners therein, and of all matters relating to the government, discipline, policies, contracts and physical concerns thereof.

Section 187 of the Correction Law charges the Department of Correction with the duty of preparing graded wage schedules for paid prisoners and the promulgation of rules providing for the manner in which their earnings shall be paid to the prisoner or his dependents or held in trust for him until his release.

Section 189, in mandating that compensation to the credit of a prisoner be withdrawn by the prisoner during his imprisonment only with the approval of the Commissioner of Correction, states:

> "The amount of such compensation to the credit of any prisoner may be drawn by the prisoner during his imprisonment, only upon approval of the commissioner to aid dependent relatives of such prisoner, or for such other purposes as the commissioner may approve. Such disbursement to aid a dependent relative of a prisoner may be made without the consent of such prisoner upon the certificate of the commissioner of welfare, or other officer performing the duties of a commissioner of welfare, of the community in which such dependent is located. Any balance to the credit of any prisoner at the time of his conditional release as provided by this chapter shall be subject to the draft of

the prisoner in such amounts and at such times as the commissioner shall approve; provided, however, that at the date of absolute discharge of any prisoner the balance as aforesaid shall be paid to such prisoner."

Clearly the function of the respondent Commissioner of Correction is solely administrative. The courts of New York State have uniformly held that they will not interfere with the performance of an administrative function nor will they substitute their judgment for that of a state agency performing duties properly delegated by law *(Peo. ex rel. Shau* v. *McWilliams,* 185 N. Y. 92; *Peo. ex rel. Moriarty* v. *Creelman,* 206 N. Y. 570; *Peo. ex rel. New York & Queens Gas Co.* v. *McCall,* 219 N. Y. 84, aff'd. 245 U. S. 345).

CONCLUSION

It is respectfully submitted that the petition should be denied.

Dated: Albany, N. Y., March 6, 1950.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
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of New York,
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The Capitol,
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Assistant Attorneys General,
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EXHIBIT A

(Copy)

SUPREME COURT—ALBANY COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK, In the Matter of EVERETT RHEIM,

Petitioner,

against

JOHN A. LYONS, as Commissioner of Correction of the State of New York, Albany, New York,

Respondent.

(Albany Special Term, December 10, 1948.)

Appearances:

Everett Rheim, Petitioner, In Person (submitting).

Nathaniel L. Goldstein, Attorney-General, (Herman N. Harcourt, Assistant Attorney-General of counsel) Attorney for Respondent.

MEMORANDUM

ELSWORTH, *J.*

The petitioner is now confined in Auburn State Prison by virtue of a conviction in the Court of General Sessions of New York County in 1928 for the crime of murder in the second degree. He here makes application under article 78 of the Civil Practice Act for an order directing the respondent Commissioner of Correction to place all reserve monies standing to petitioner's credit as reserve compensation "in a Federal Reserve Bank of Auburn, New York, subject to the said Everett Rheim's disposal."

The respondent has raised objections in point of law.

Even assuming that there has been a refusal of a proper demand herein, the petitioner is clearly not entitled to succeed upon this application. The duty of the Commissioner of Correction with respect to earnings of prisoners is solely an administrative function. (See §§ 112, 187, subd. 3 and § 189 of the Correction Law; also 1940 Atty. Gen. 374.) In the absence of his violation of statute or a palpable abuse of the discretion given him, this court is without jurisdiction to act. Nothing has been shown here which can be construed as in any way bringing the proceeding within either of those categories.

Accordingly, the respondent's motion to dismiss is granted.

Submit order.

December 29, 1948.